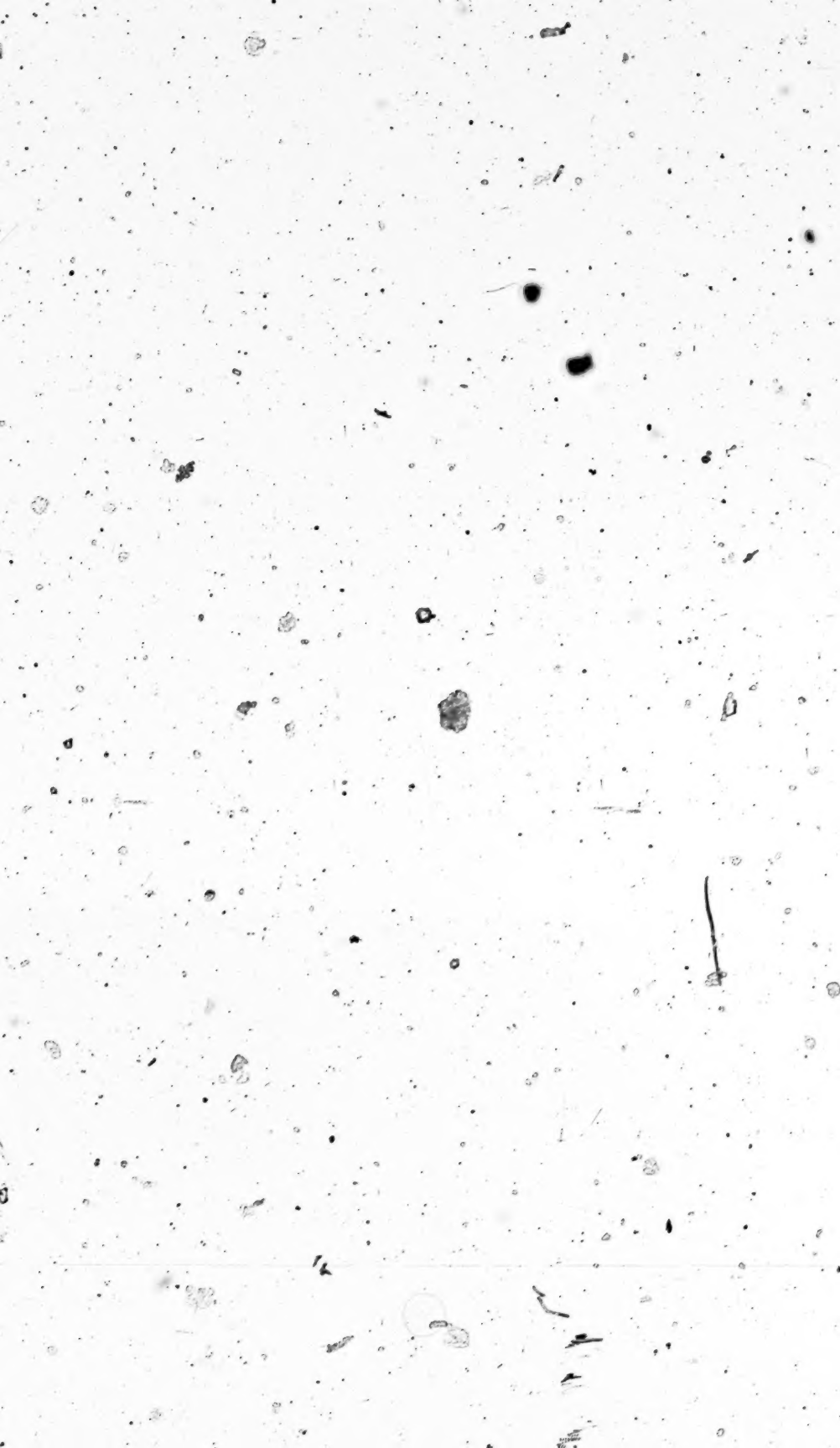

FILE COPY
Office - Supreme Court, U. S.
FILED
APR 1 1940
CHARLES ELMORE CROPLEY
CLERK

In the

Supreme Court of the United States

October Term, 1935.

In Equity.

No. 10, ORIGINAL.

THE STATE OF WYOMING, *Complainant*,

vs.

THE STATE OF COLORADO, *Defendant*.

BRIEF OF DEFENDANT.

RALPH L. CARR,
Governor of the State of Colorado,

CLIFFORD H. STONE,
JEAN S. BREITENSTEIN,
Special Counsel for the State of Colorado.

Denver, Colorado,
March 30, 1940.

CLARK-BOICK PRINTING CO., LAWRENCE 1332-34, DENVER, COLO.

SUBJECT INDEX.

	PAGE
FORMER DECISIONS	1
JURISDICTION	2
STATEMENT OF THE CASE	2
1. In General	2
2. The Petition of Wyoming	4
3. The Return of Colorado	7
SPECIFICATION OF POINTS TO BE URGED	10
SUMMARY OF ARGUMENT	10
ARGUMENT	11
I. The return of the governor of Colorado is the return of the state of Colorado	11
II. This is a suit between states which should be considered with proper regard for the nature of the controversy and not with regard solely for the technical niceties of procedure	12
III. In an interstate suit involving the apportionment of the water of an interstate stream between states, this Court does not determine individual rights between water users in one of the states	13
IV. The decisions in this controversy make an equitable apportionment of stream flow and do not change the relative rights of Colorado appropriators	16
V. The alleged excessive meadowland diversions in 1939 were with the consent and acquiescence of Wyoming	21
VI. Wyoming has suffered no injury	24
VII. Wyoming has made no showing to justify the exercise of the extraordinary power to punish for contempt	27
VIII. Conclusion	30

CASES CITED.

PAGE

A

Albion v. Naf Irrigatio Company, 97 F. 2d 439, 444, 445 15

Arizona v. California, 283 U. S. 423, 459, 51 S. Ct. 522, 527 13

C

California-Oregon Company v. Beaver Portland Cement Company, 295 U. S. 142, 164, 55 S. Ct. 725, 731 14

Connecticut v. Massachusetts, 282 U. S. 660, 674, 51 S. Ct. 286, 291 ..... 12, 25

E

Ex Parte Kentucky v. Dennison, 24 How. 66, 109, 16 L. Ed. 717, 726 ..... 11, 28

G

Gompers v. Buck Stove & Range Company, 221 U. S. 418, 451, 31 S. Ct. 492, 502 27

H

Hinderlider v. La Plata, 304 U. S. 92, 58 S. Ct. 803 15

K

Kansas v. Colorado, 206 U. S. 46, 27 S. Ct. 655, 665 ..... 13, 14

L

Louisiana v. Texas, 176 U. S. 1, 20 S. Ct. 251, 257 28

M

Missouri v. Illinois, 200 U. S. 496, 522, 26 S. Ct. 268, 270 27

N

National Licorice Company v. National Labor Relations Board, 60 S. Ct. 566, decided March 4, 1940 .. 15

Nebraska v. Wyoming, 295 U. S. 40, 43, 55 S. Ct. 568, 569 13

New York v. New Jersey, 256 U. S. 296, 313, 41 S. Ct. 492, 498 30

North Dakota v. Minnesota, 263 U. S. 365, 374, 44 S. Ct. 138, 139 12

PAGE

R

Rhode Island v. Massachusetts, 14 Pet. 210, 257 12

V

Virginia v. West Virginia, 220 U. S. 1, 27, 31 S. Ct. 330, 333 12

W

Washington v. Oregon, 297 U. S. 517, 523, 56 S. Ct. 540, 543 ..... 12, 24, 25

Wyoming v. Colorado, 259 U. S. 419, 465, 42 S. Ct. 552, 557 ..... 1, 2, 12, 13, 16, 17

Wyoming v. Colorado, 259 U. S. 496, 42 S. Ct. 594 1

Wyoming v. Colorado, 260 U. S. 1, 43 S. Ct. 2 ..... 1, 2

Wyoming v. Colorado, 286 U. S. 494, 52 S. Ct. 621 ..... 1, 3, 17

Wyoming v. Colorado, 298 U. S. 573, 56 S. Ct. 912 ..... 1, 4, 18, 20, 23

Constitutional Provisions.

Colorado Constitution, Sec. 2, Art. IV 11

United States Constitution, Fifth Amendment 15

Statutes Cited.

Act of March 3, 1877, c. 107, Sec. 1, 19 Stat. 377, 43 U. S. C. A. 321 14

Texts Cited.

Rapalje on Contempt, p. 62, Sec. 47 24

High on Injunction, 4th Ed., Sec. 437 24

17 C. J. S. 53 24

32 C. J. 492 24

In the

Supreme Court of the United States

October Term, 1935.

In Equity.

No. 10, ORIGINAL.

THE STATE OF WYOMING, *Complainant,*

vs.

THE STATE OF COLORADO, *Defendant.*

BRIEF OF DEFENDANT.

FORMER DECISIONS.

The former opinions and decrees of this Court in this controversy are officially reported as follows:

Wyoming v. Colorado, 259 U. S. 419;
Wyoming v. Colorado, 259 U. S. 496;
Wyoming v. Colorado, 260 U. S. 1;
Wyoming v. Colorado, 286 U. S. 494;
Wyoming v. Colorado, 298 U. S. 573.

JURISDICTION.

This cause involves a controversy between two states of the union. The original jurisdiction of the Court is invoked.

STATEMENT OF THE CASE.

1. In General.

This proceeding has been brought by Wyoming to require Colorado to be

(a) adjudged in contempt of this Court,

(b) punished for the alleged violation of an injunctive decree, and

(c) compelled to make restitution to Wyoming and her water users for alleged injuries.

In 1911 an original suit was brought by Wyoming against Colorado and two Colorado corporations to prevent a proposed diversion in Colorado of part of the waters of the Laramie river, an interstate stream which is unnavigable (259 U. S. 455, 456). A decree, entered therein on October 9, 1922, states that (260 U. S. 1):

> "It is considered, ordered, and decreed that the defendants, their officers, agents, and servants, be, and they are hereby, severally enjoined from diverting or taking from the Laramie river and its tributaries in the state of Colorado more than 15,500 acre feet of water per annum in virtue of or through what is designated in the pleadings and evidence as the Laramie-Poudre Tunnel appropriation in that state.
>
> Provided that this decree shall not prejudice the right of the state of Colorado, or of any one recognized by her as duly entitled thereto, to continue to exercise the right now existing and hereby recognized to divert and take from such stream and its tributaries in that state 18,000 acre feet of water

per annum in virtue of and through what is designated in the pleadings and evidence as the Skyline Ditch appropriation in that state, nor prejudice the right of that state, or of any one recognized by her as duly entitled thereto, to continue to exercise the right now existing and hereby recognized to divert and take from such stream and its tributaries in that state 4,250 acre feet of water per annum in virtue of and through the meadowland appropriations in that state which are named in the pleadings and evidence, nor prejudice the right of the state of Colorado, or of any one recognized by her as entitled thereto, to continue to exercise the right now existing and hereby recognized to divert and take from the headwaters of Deadman creek, a Colorado tributary of the Laramie river, the relatively small amount of water appropriated therefrom prior to the year 1902 by and through what is designated in the evidence as the Wilson Supply Ditch, nor prejudice or affect the right of the state of Colorado or the state of Wyoming, or of any one recognized by either state as duly entitled thereto, to continue to exercise the right to divert and use water from Sand creek, sometimes spoken of as a tributary of the Laramie river, in virtue of any existing and lawful appropriation of the waters of such creek."

In 1930 Wyoming brought an original suit against Colorado to enforce the above decree (286 U. S. 494, 495). A motion to dismiss filed by Colorado was overruled on May 31, 1932. In its opinion then rendered this Court, in referring to the above decree, said (286 U. S. 508):

"* * * we think it (the decree) was intended to and does define and limit the quantity of water which Colorado and her appropriators may divert from the interstate stream and its tributaries and thus withhold from Wyoming and her appropriators."

Colorado then filed her answer. Evidence was taken before commissioners. The decision announced on June 1, 1936, held that the 1922 decree should be taken as if the exact amount of 2,000 acre feet were written into the provision relative to the Wilson Supply Ditch appropriation. In determining that Skyline Ditch diversions in excess of 18,000 acre feet per annum did not constitute an infraction of the 1922 decree, the Court said (298 U. S. 585):

> "The thing which the decree recognizes and confirms is 'the right of the state of Colorado, *or of any one recognized by her as duly entitled thereto,* * * * to divert and take' the water included in the designated appropriations."

It was further held that in reference to the meadowland appropriations the 1922 decree referred to "the water taken from the stream at the point of diversion" and the following decree was entered:

> "IT IS CONSIDERED, ORDERED AND DECREED that the state of Colorado, her officers, agents and servants, and her water claimants, be, and they are hereby, severally enjoined from diverting or taking from the Laramie river and its tributaries in the state of Colorado more than four thousand, two hundred and fifty (4,250) acre feet of water per annum in virtue of and through the meadowland appropriations in that state which are named in the pleadings and evidence, such diversion to be measured at the headgates through which the water is diverted."

"2. The Petition of Wyoming.

After alleging the jurisdictional facts, the petition sets up the 1922 decree and asserts that thereby this Court confirmed and established the right of Colorado or of any one recognized by her as duly entitled thereto to divert and take the amounts above mentioned and the right

of Wyoming and her water claimants to receive and divert the remaining water of the stream and its tributaries. Paragraph Fifth avers that from May 1 to June 18, 1939, the following quantities of water were taken from the stream in Colorado:

Skyline ditch	9,013 acre feet;
Laramie-Poudre tunnel	7,458 acre feet;
Wilson Supply Ditch	872 acre feet;
Meadowlands	22,526 acre feet;
Total	39,869 acre feet.

It is then alleged that on June 19, 1939, Colorado closed all headgates and posted a notice on each. Paragraph Seventh states that on June 22, 1939, in violation of the decree of this Court rendered June 1, 1936, the Colorado headgates were reopened and water in excess of "the total allocation of 39,750 acre feet" was taken in the following quantities up to July 11, 1939:

Skyline ditch	3,644 acre feet;
Laramie-Poudre tunnel	2,530 acre feet;
Meadowlands	6,499 acre feet;
Total	12,673 acre feet.

It should be noted that no diversions after June 19, 1939, are charged to the Wilson Supply Ditch.

The petition then refers to the decree of June 1, 1936, and in Paragraph Ninth specifically charges a violation thereof in the following language:

> "That the said defendant, the state of Colorado, her officers, agents and servants, and her water claimants, has intentionally disobeyed said injunctional order and decree and, in contempt of this Honorable Court the said defendant, her officers, agents and servants, and her water claimants, from

on or about the first day of May, A. D. 1939, to and including the eleventh day of July, A. D. 1939, has diverted, taken and permitted the diversion and taking through the headgates of said meadowland ditches, from the natural channel of the said Laramie river in the state of Colorado, 24,775 acre feet of water over and above the 4,250 acre feet of water awarded and set over unto said meadowland diversions under the decree of this Honorable Court of June 1, A. D. 1936."

Material and substantial injury is alleged in general terms. It is noteworthy that no loss of, or damage to, crops because of any withholding of water by Colorado is claimed.

Wyoming states that notice was given Colorado of diversions in excess of 39,750 acre feet and that Colorado was requested to close all headgates on the river forthwith. It is averred that on July 1, 1939, officials of the two states met at Denver, Colorado, at which meeting Wyoming protested the excess diversions and Colorado, while admitting diversions in excess of 39,750 acre feet, refused to close the ditch headgates. On July 7, 1939, Wyoming formally protested in writing and requested Colorado to prevent the alleged excessive diversions. In the concluding paragraph it is stated that the diversions complained of are all in Colorado and are outside of the jurisdiction of Wyoming. Substantial damage is again alleged without any particular statement as to the nature or pecuniary amount of such damage.

The prayer is that Colorado be required to show cause

"* * * why the said defendant should not be adjudged in contempt and punished for violating said injunction and decree: that a fine be imposed upon said defendant, for the use of said complainant, sufficient in amount to reimburse your complainant and her water appropriators from the said

Laramie river for injuries sustained by reason of the violation by the said defendant of said injunctional order and decree of June 1, A. D. 1936."

On March 4, 1940, this Court ordered that Colorado show cause on or before March 25, 1940, why the prayer of the petition should not be granted.

3. The Return of Colorado.

Colorado sets out the facts with relation to the administration of the stream in Colorado since the decree of June 1, 1936, and says that the time for the filing by Colorado of a petition for rehearing was extended to September 15, 1938, with Wyoming's consent and during said period the Colorado meadowland appropriators, with the knowledge and consent of Wyoming, diverted water in accordance with the Colorado laws as had been their custom for over 50 years. In 1937 the two states cooperated in the installation on seven representative meadowland ditches of headgates equipped with automatic measuring gages so that a joint study could be made of the irrigation of the Colorado meadowlands. This study revealed that in 1937 approximately ten acre feet of water was diverted at the headgates for the irrigation of each acre of meadowland. Prior to the 1939 irrigation season measuring devices were installed on all Colorado meadowland ditches.

On September 24, 1938, a Colorado meadowland appropriator brought a class suit against the Colorado transmountain appropriators and Colorado water officials. This resulted in a decree as of February 2, 1939, wherein the Colorado district court ruled in favor of the meadowland appropriators and enjoined that the stream be administered in accordance with Colorado law until a total of 39,750 acre feet of water had been diverted at the ditch headgates and that then all headgates should be closed. This case is now pending in the Colorado Supreme Court on writ of error.

During the 1939 irrigation season Colorado water officials administered the stream in accordance with Colorado law until the 39,750 acre feet had been diverted. All headgates were then closed. After such closing and in order to save their hay crop, the meadowland appropriators presented their situation to Wyoming and Ben E. Le Vasseur, the Wyoming hydrographer in charge of measuring and reporting water diversions on the Laramie river, in writing advised R. M. Leake, Jr., the secretary of the Upper Big Laramie River Water Users Association, that he had presented the matter of the reopening of the Colorado meadowland headgates to L. C. Bishop, the Wyoming state engineer, and that Wyoming would not object to the reopening of the meadowland headgates (Exhibit "C."). In accordance with such understanding and with the knowledge and consent of Wyoming the meadowland ditches again reopened their headgates. Later the transmountain diverters, with the exception of the Wilson Supply Ditch, reopened their headgates.

The conference with the Wyoming officials on July 1, 1939, is admitted and it is alleged that at such conference Wyoming did not object to the reopening of the meadowland headgates.

Colorado further avers that water diverted in 1939 contrary to the decree of June 1, 1936, was diverted with the knowledge, consent and acquiescence of Wyoming and that Colorado did not authorize or direct any diversion after 39,750 acre feet had been diverted at the ditch headgates. Identical methods for the irrigation of meadowlands along the Laramie river have been used in both Wyoming and Colorado since the settlement of that valley. With knowledge that such methods result in a return directly to the stream of 75% of the headgate diversions, Wyoming pleaded in the original suit in this Court the fact of such return and in 1939 consented to the reopening of the Colorado meadowland headgates.

It is then alleged in the return that Colorado recognizes that under the decisions and decrees of this Court she is now limited to headgate diversions of 39,750 acre feet annually. In the distribution of this water the local Colorado laws apply. Wyoming has disregarded the fact that the meadowland diversions in excess of 4,250 acre feet were in accord with the state law until June 18, 1939, and thereafter were with the consent of Wyoming.

Colorado alleges that Wyoming and her water users suffered no injury from the acts complained of in the petition and that to the contrary Wyoming's own statements and admissions established that Colorado withheld 8,977 acre feet less than her equitable share of 39,750 acre feet.

The return states that the administration of the stream in 1939 was difficult because of disputes between the meadowland and transmountain appropriators as to the effect of the decisions and decrees of this Court and that notwithstanding such difficulty the Colorado officials complied with the decrees of both this Court and the Colorado Court until the headgate diversions amounted to 39,750 acre feet. Thereafter the confusion resulting from Wyoming's consent to the reopening of the meadowland headgates caused further uncertainty. The Colorado officials did not authorize or direct any diversions after 39,750 acre feet had been taken.

Colorado says that in the future, unless this Court orders otherwise, the flow of the stream will be administered under Colorado law until 39,750 acre feet is taken at the headgates which will then be closed and kept closed during the remainder of the irrigation season.

Particular attention is directed to the affidavits of the governor and state engineer of Colorado wherein they state that at the conference of July 1, 1939, the Wyoming officials did not object to the reopening of the meadowland headgates, saying that there was a return flow from such

headgate diversions in excess of 75%. Also the affidavit of R. M. Leake, Jr., as to the circumstances under which the Colorado meadowland headgates were reopened should be noted.

SPECIFICATION OF POINTS TO BE URGED.

Wyoming relies upon the proposition that diversions by the Colorado meadowland appropriators in excess of 4,250 acre feet in 1939 constitute a violation of the 1936 decree.

Colorado contends in defense:

1. Meadowland diversions in excess of 4,250 acre feet were in accordance with Colorado law and the decrees of this Court until June 18, 1939 (when a total of 39,750 acre feet had been diverted at Colorado ditch headgates), and thereafter were with the consent and acquiescence of Wyoming.

2. Wyoming has not been injured.

SUMMARY OF ARGUMENT.

The argument for Colorado may be summarized as follows:

I. The return of the governor of the state of Colorado is the return of the state of Colorado.

II. This is a suit between states which should be considered with proper regard for the nature of the controversy and not with regard solely for the technical niceties of procedure.

III. In an interstate suit involving the apportionment of the water of an interstate stream between states, this Court does not determine individual rights between water users in one of the states.

IV. The decisions in this controversy make an equitable apportionment of stream flow and do not change the relative rights of Colorado appropriators.

V. The alleged excessive meadowland diversions in 1939 were with the consent and acquiescence of Wyoming.

VI. Wyoming has suffered no injury.

VII. Wyoming has made no showing to justify the exercise of the extraordinary power to punish for contempt.

VIII. Conclusion.

ARGUMENT.

I.

THE RETURN OF THE GOVERNOR OF COLORADO IS THE RETURN OF THE STATE OF COLORADO.

The governor of the state of Colorado, by his executive order of March 20, 1940, removed Byron G. Rogers, attorney general of the state of Colorado, as the duly accredited representative of the state of Colorado in this cause. By Section 2, Article IV, of the Colorado Constitution, the supreme executive power of the state is vested in the governor (Return, page 2). There is no statute of the state of Colorado authorizing the Colorado attorney general to appear for Colorado in an interstate suit in this Court except when required so to do by the governor or General Assembly of the state. There has been no such requirement in the instant case.

It has been settled that where a state of the union is a party litigant in this Court the governor represents the state (Ex Parte Kentucky v. Dennison, 24 How. 66, 98, 16 L. Ed. 717, 726). Accordingly, the return made herein by the governor of the state of Colorado should be considered as the return of the state.

II.

THIS IS A SUIT BETWEEN STATES WHICH SHOULD BE CONSIDERED WITH PROPER REGARD FOR THE NATURE OF THE CONTROVERSY AND NOT WITH REGARD SOLELY FOR THE TECHNICAL NICETIES OF PROCEDURE.

This Court will not exert its extraordinary power to control the conduct of one state at the suit of another unless the threatened invasion of rights is of serious magnitude and established by convincing evidence. (Connecticut v. Massachusetts, 282 U. S. 660, 669, 51 S. Ct. 286, 289; Washington v. Oregon, 297 U. S. 517, 522, 56 S. Ct. 540, 542). The burden on Wyoming herein to sustain her allegations is much greater than that generally required to be borne by one seeking to enforce by contempt proceedings an injunction granted in a suit between private parties (North Dakota v. Minnesota, 263 U. S. 365, 374, 44 S. Ct. 138, 139). Cases between states of the union are too important in character and the interests concerned too great to be decided upon mere technical principles of equity pleading (Rhode Island v. Massachusetts, 14 Pet. 210, 257). This case should be considered in the untechnical spirit proper for dealing with a quasi-international controversy (Virginia v. West Virginia, 220 U. S. 1, 27, 31 S. Ct. 330, 333). Municipal law relating to like questions between individuals is to be taken into account but is not to be deemed to have controlling weight (Connecticut v. Massachusetts, supra, page 670). Principles of right and equity having regard to the equal level and plane upon which all states stand in point of power and right under our constitutional system will be applied in determining this controversy (Wyoming v. Colorado, 259 U. S. 419, 465, 42 S. Ct. 552, 557).

III.

IN AN INTERSTATE SUIT INVOLVING THE APPORTIONMENT OF THE WATER OF AN INTERSTATE STREAM BETWEEN STATES THIS COURT DOES NOT DETERMINE INDIVIDUAL RIGHTS BETWEEN WATER USERS IN ONE OF THE STATES.

Wyoming's petition appears to be predicated upon the theory that this Court by its decree of June 1, 1936, absolutely limited the Colorado meadowland appropriators to headgate diversions of 4,250 acre feet per annum. This is erroneous because this Court actually determined the equitable apportionment of stream flow belonging to Colorado and nothing else.

This Court unquestionably has jurisdiction in an original suit between two states to equitably apportion the flow of an interstate stream. It has been held in such suits that private water users are not proper parties. In Kansas v. Colorado, 206 U. S. 46, 85, 27 S. Ct. 655, again in this litigation Wyoming v. Colorado, 259 U. S. 419, 467, 42 S. Ct. 594, and in Nebraska v. Wyoming, 295 U. S. 40, 43, 55 S. Ct. 568, 569, this Court has held that such a suit is not between private appropriators but is one between states whose interests are indissolubly linked with the rights of their water users.

Under the appropriation doctrine prevailing in both Wyoming and Colorado the rights of individuals in the use of water are acquired under state laws. This principle has been recognized by this Court in the case of Arizona v. California, 283 U. S. 423, 459, 51 S. Ct. 522, 527, wherein it is said:

> "To appropriate water means to take and divert a specified quantity thereof and put it to beneficial use *in accordance with the laws of the state where such water is found*, and, by so doing, to acquire

> *under such laws*, a vested right to take and divert from the same source, and to use and consume the same quantity of water annually forever, subject only to the right of prior appropriations." (Italics ours.)

In Kansas v. Colorado, 206 U. S. 46, 93, 27 S. Ct. 655, 665, this Court held that a state has full jurisdiction over the lands within her borders, including the beds of streams and other waters. By the Desert Land Act of 1877 Congress declared that

> "* * * all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands therein navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights." (Act of March 3, 1877, c. 107, Sec. 1, 19 Stat. 377, 43 U. S. C. A. 321.)

In California-Oregon Power Company v. Beaver Portland Cement Company (295 U. S. 142, 164, 55 S. Ct. 725, 731) it was held that:

> "* * * following the Act of 1877, if not before, all non-navigable water of any part of the public domain became publici juris subject to the plenary control of the designated states * * *."

It is thus apparent that both this Court and Congress have recognized the control of the states over the appropriation of water within their borders. This power of a state to determine rights as between its own water users may not be abridged or impaired in any way. The proposition involved is fundamental. Private water users who may not be parties to suits in this Court between two states may not have their vested rights impaired or destroyed thereby. The equitable apportionment of stream

flow whether by decree of this Court or by compact is not such an impairment or destruction (Hinderlider v. La Plata, 304 U. S. 92, 58 S. Ct. 803). On the other hand the modification of state decrees by changing the relative rights of individual water users is an impairment and destruction of vested rights.

An adjudication in interstate river litigation binds the individual water users to the extent of the particular state's equitable interest in the river; but the relative rights between the private appropriators within the state are controlled by the local laws, under which rights are vested in individual appropriators in the state's equitable apportionment of an interstate river. These vested rights cannot be abridged or impaired in violation of the Fifth Amendment to the Constitution of the United States.

It is, of course, elementary that strangers to a judgment or decree are not bound thereby in actions in personam (National Licorice Company v. National Labor Relations Board, 60 S. Ct. 566, decided March 4, 1940). An exception is recognized in the cases of a judgment strictly in rem but it has been held by the 10th Circuit Court of Appeals (Albion v. Naf Irrigation Company, 97 F. 2d 439, 444), that such exception does not apply to judgments in proceedings quasi in rem like suits to quiet title or to adjudicate water rights. A suit between two states over the apportionment of the flow of an interstate stream is not a case strictly in rem.

The situation before the Tenth Circuit Court in Albion v. Naf Irrigation Company, supra, is somewhat analogous. The Court there considered a dispute between water users in the state of Utah and water users in the state of Idaho. In affirming the decree of the trial Court the Court said (97 F. 2d 445):

> "The sole province of the trial court was to divide the waters between the users in the state of

> Utah and the users in the state of Idaho, and leave the division of the waters among the several users in the upper group to the state court decree to which they were parties and among the several users in the lower group to the federal court decree to which they were parties. While in so doing it was the duty of the trial court to recognize the several priorities we cannot say from the evidence before us and the findings that the decree did not fully recognize the priorities of the several users on the stream."

Likewise, in this suit between Wyoming and Colorado the division of water among the several users in each state depends entirely upon the laws of their respective state.

IV.

THE DECISIONS IN THIS CONTROVERSY MAKE AN EQUITABLE APPORTIONMENT OF STREAM FLOW AND DO NOT CHANGE THE RELATIVE RIGHTS OF COLORADO APPROPRIATORS.

The decisions of this Court in this controversy show clearly that the Court has made an equitable apportionment between Wyoming and Colorado of the stream flow by defining the quantity of water which Colorado may withhold from Wyoming. Wyoming commenced this litigation by suing Colorado to prevent a proposed transmountain diversion through the Laramie-Poudre Tunnel. The Court considered the principle of "equity of right" referred to in Kansas v. Colorado, supra, and held that, between two states each of which adhered to the appropriation as opposed to the riparian doctrine, the rule of priority furnished the only basis consonant with right and equity for the division of the stream flow (259 U. S. 470). After analyzing the evidence the Court concluded that the stream flow at the interstate station "after the recognized Colorado appropriations are satisfied" was 170,000 acre

feet per annum (259 U. S. 485) and that the entire available supply for the proposed Colorado transmountain appropriation and the Wyoming appropriations was 288,000 acre feet per annum (259 U. S. 488). The Wyoming rights senior to the proposed Colorado tunnel project were fixed at 272,500 acre feet and a decree was ordered enjoining a diversion of more than 15,500 acre feet per year by means of the Laramie-Poudre Tunnel.

The decree which was entered enjoins Colorado "from diverting or taking" more than 15,500 acre feet of water per annum "in virtue of or through" the Laramie-Poudre Tunnel appropriation. After this specific injunction it is stated "provided that this decree shall not prejudice the right of the state of Colorado or of any one recognized by her as duly entitled thereto *to continue to exercise the right now existing and hereby recognized* to divert and take" 18,000 acre feet of water per annum in virtue of and through Skyline Ditch appropriation, 4,250 acre feet of water per annum in virtue of and through the meadowland appropriations, 2,000 acre feet of water by and through the Wilson Supply Ditch. *This is a recognition, not an adjudication, of the Colorado rights existing prior to the Laramie-Poudre Tunnel appropriation.*

In the second suit brought by Wyoming against Colorado to enforce the above decree Colorado filed a motion to dismiss contending that the decree did not determine the full quantity of water which rightfully might be diverted from the stream in that state. This was overruled, the Court saying (286 U. S. 533, 508, 52 S. Ct. 621, 626):

> "construing the decree in the light of the record and opinion to which counsel for both states appeal, we think it was intended to and does define and limit the quantity of water which Colorado and her appropriators may divert from the interstate stream and its tributaries and thus withhold from Wyoming and her appropriators."

Colorado then filed her answer and evidence was taken before commissioners.

In determining upon its merits this second action the Court stated in its opinion (298 U. S. 578) that there were two departures from the decree charged against Colorado, "one comprising diversions under claims not confirmed or recognized in the decree, and the other consisting of diversions under each of the confirmed Colorado claims of more water than the decree accredits to the claim." After disposing of the first proposition in favor of Colorado, the Court considered the meadowland appropriations and ruled that the figure stated in the 1922 decree referred to headgate diversions rather than to consumptive use. An injunction was then ordered "forbidding further departures from the decree in this regard." The Court then discussed the alleged departures from the decree by the Colorado transmountain diverters and recited that Wyoming's complaint charged that the diversions under the Skyline Ditch and the Laramie-Poudre Tunnel have been in excess of the quantities accredited to them by the decree and that Colorado's answer admitted the charge in respect to the Skyline appropriation, denied that the Laramie-Poudre Tunnel diversions have been in excess of the accredited quantities, and alleged that Colorado lawfully may permit diversions under any of the recognized appropriations in excess of the accredited quantities so long as the total diversions under all do not exceed the aggregate of the quantities accredited to them severally. The Court then found from the evidence that the Skyline appropriation had exceeded the quantity stated in the decree, that the tunnel appropriation had not, and that, if the meadowland appropriations were put aside, the total diversions under the other appropriations had not exceeded in the aggregate the quantities accredited to them separately. The position taken by Colorado in the defense of the Skyline diversions was sustained by the Court in the following language:

"It was not the purpose of that suit or of the decree to withdraw water claims dealt with therein from the operation of local laws relating to their transfer or to restrict their utilization in ways not affecting the rights of one state and her claimants as against the other state and her claimants.

We perceive no reason for thinking that it is in any wise material to Wyoming and her water claimants whether the water in question is diverted and conveyed to the place of use through the Skyline Ditch, the Wilson Supply Ditch, or the ditches of the Laramie-Poudre Tunnel project. All are transmountain ditches and deliver the water in the Cache La Poudre Valley, which is in another watershed.

The diversions through the transmountain ditches in the quantities here shown are made with the consent of the owners of the water rights and with the full sanction of Colorado. Therefore, as respects the present question, the situation is not different from what it would be had the owners of the other claims formally transferred parts of their water rights to the Skyline owners. The appropriations remain as they were when the decree was entered, and are still limited to the quantities which it accredits to them. But the Skyline owners are now permitted by the owners of the other claims and by Colorado to take and use part of the waters included in those claims. Wyoming and her claimants are in no way injured by this. No departure from the decree is involved. The thing which the decree recognizes and confirms is 'the right of the state of Colorado, or of any one recognized by her as duly entitled thereto, * * * to divert and take' the water included in the designated appropriations.

We are accordingly of opinion that in the circumstances here shown the Skyline Ditch diversions

do not constitute an infraction of the decree." (56 S. Ct. 917.)

In other words, this Court in dealing with the Colorado diverters who export water from the Laramie River Basin applied the principle that diversions may be made in excess of the figure stated in the 1922 decree so long as the total diversions do not exceed the aggregate of the quantities severally accredited. If this principle is good as between the Colorado transmountain appropriators it is equally good as between the Colorado transmountain appropriators as a class and the Colorado meadowland appropriators as a class. No distinction can be recognized between the two groups of ditches. Paraphrasing the statement made by this Court with respect to the Skyline Ditch, the Wilson Supply Ditch and the Laramie-Poudre Tunnel (298 U. S. 584) it can also be said "we perceive no reason for thinking that it is in any wise material to Wyoming and her water claimants, whether the water in question is diverted and conveyed to the place of use through the transmountain ditches or the meadowland ditches."

The district court of Larimer County, Colorado, has determined (see Exhibit "B" attached to Colorado's return) that meadowland appropriators have rights amounting to 203 second feet (400 acre feet per day) senior to the earliest transmountain appropriation (that of the Skyline Ditch). These senior vested rights are destroyed without their owners having had the opportunity to present a defense in Court if this Court fails to apply to Colorado's entire equitable apportionment of stream flow the principle which it has already applied to the division of water among the Colorado transmountain appropriators.

The Court did not intend by its decree of June 1, 1936, to modify the Colorado adjudication decrees and thereby destroy the vested property rights of the Colorado meadowland appropriators by limiting their annual diversions to 4,250 acre feet measured at the headgates. The entire

difficulty arises from the fact that the amount of water accredited to the Colorado meadowland appropriators by the decrees of 1922 and 1936 is less than they are entitled to receive under their Colorado priorities. This results from the 1936 determination that the 4,250 acre feet figure refers to headgate diversions rather than consumptive use. Such determination was only effective in so far as it concerned the measurement of the total quantity of the Colorado right.

By recognizing and confirming the Colorado rights senior to the Laramie-Poudre Tunnel, the Court did not adjudicate the relative priorities or seniorities of such rights under Colorado law.

V.

THE ALLEGED EXCESSIVE MEADOWLAND DIVERSIONS IN 1939 WERE WITH THE CONSENT AND ACQUIESCENCE OF WYOMING.

Wyoming alleges in her petition (paragraph Ninth) that Colorado has disobeyed the decree of June 1, 1936, by taking "through the headgates of said meadowland ditches from the natural channel of the said Laramie river in the state of Colorado, 24,775 acre feet of water over and above the 4,250 acre feet of water awarded and set over unto said meadowland diversions under the decree of this honorable Court of June 1, A. D. 1936." The petition sets out meadowland diversions to June 18, 1939, of 22,526 acre feet (on June 18 Colorado's share of 39,750 acre feet had been diverted) and after that date and until July 11, 1939, of 6,499 acre feet.

Colorado's position is that the meadowland diversions to June 18, 1939, were proper because they were made in accordance with the priorities established by Colorado law and that the diversions complained of after June 18 and until July 11 were made with the consent and acquiescence of Wyoming.

Attached to Colorado's return as Exhibit "C" is the affidavit of R. M. Leake, Jr., the secretary of the Upper Big Laramie River Water Users Association which is composed of the Colorado meadowland appropriators on the Laramie river. On May 22, 1939, he wrote to the Wyoming official in charge of the interstate distribution of the stream flow, inquiring as to whether or not Wyoming would demand the closing of the meadowland headgates after the diversion of 39,750 acre feet of water in Colorado. On June 5, 1939, Ben Le Vasseur, special hydrographer of Wyoming, replied:

> "Upon receipt of your letter of May 22, 1939, I wrote to the Wyoming State Engineer, Mr. L. C. Bishop, and told him of your question concerning whether or not Wyoming would demand a regulation of the Upper Laramie ditches belonging to the valley ranchers after the 39,750 acre feet allowed Colorado by the Court decree has been used.
>
> At this time my orders are not to demand such a regulation, and if doesn't seem probable that Wyoming will demand a regulation of rights on the Laramie river where it will receive the benefit of the return flow."

The Leake affidavit further discloses that on June 10, 1939, the water users association adopted a resolution declaring that in view of the above quoted letter the members of the association would open their headgates after they had been closed by the Colorado officials and would keep them open until notified by Wyoming to close them. It is stated that the Wyoming hydrographer, Le Vasseur, was present at the meeting and approved of the action taken. The affidavit further states that when the state engineer of Wyoming requested the closing of the meadowland headgates such headgates were closed.

The affidavit of Ralph L. Carr, the governor of the state of Colorado, states that at a meeting held in his of-

fice July 1, 1939, attended by the attorney general and the state engineer of Wyoming, those two Wyoming officials stated that "although more than 4,250 acre feet of water had already been diverted * * * they had no objection to continued diversions being made through the meadowland ditches for the reason that a great portion of all of the water so diverted returned to the Laramie river to be used downstream by water appropriators within the state of Wyoming" and that the Wyoming state engineer said that "in his opinion at least 75% to 85% of all diversions into said meadowland ditches in Colorado returned to the Laramie river and became available for use by Wyoming and her appropriators." This affidavit is corroborated by the affidavit of the Colorado state engineer, M. C. Hinderlider which is attached to the return as Exhibit "E."

The failure of this Court to recognize Colorado's contention that the greater part of meadowland headgate diversions return to the stream (298 U. S. 581) does not preclude Wyoming from recognizing the fact of such return flow. Prior to the institution of this proceeding Wyoming always admitted that the Colorado meadowland diversions resulted in an enormous return to the stream. The methods of irrigating the meadowlands along the Laramie river in both states have been identical since the settlement of that valley approximately 70 years ago. From her own experience Wyoming knows that it is necessary to irrigate the hay on such meadowland so that the plant roots are kept moist until about August 1st of each year. For many years this has been accomplished in each state by the flooding of the fields with water diverted from the river. Experience in Wyoming has further shown that at least 75% of the water so diverted returns directly to the stream. Wyoming pleaded this fact in her original complaint (Vol. 1, page 7, transcript of record). After the entry of the decree of June 1, 1936, she made no objection to the meadowland diversions in that year. In 1937 she par-

ticipated with Colorado in a joint study of the irrigation of the meadowlands, a study which disclosed that there were headgate diversions of approximately ten acre feet of water for the irrigation of one acre of land. In 1938 Wyoming did not object to the irrigation of the meadowlands in accordance with the practice which had existed for many years. In 1939 after Colorado had closed the meadowland headgates, Wyoming consented to their reopening.

Under such circumstances the "equity of right" which is applied by this Court in determining interstate controversies requires that Colorado should not now be held accountable for the continuance of a practice that has existed for years and which Wyoming has expressly approved.

Even in litigation between private individuals the general rule is that the party at whose instance an injunction issued cannot have the party enjoined punished in a contempt proceeding for breach of the injunction when the breach was committed with his consent or acquiescence (Rapalje on Contempt, page 62; Sec. 47; High on Injunctions, 4th Ed., Sec. 437; 17 C. J. S. 53; 32 C. J. 492).

The act of Wyoming in consenting to Colorado meadowland diversions after the headgates had been closed by Colorado officials and then complaining in this Court because of such diversions is not "the high equity that moves the conscience of the Court in giving judgment between states" (Washington v. Oregon, 297 U. S. 517, 523, 56 S. Ct. 540, 543).

VI.

WYOMING HAS SUFFERED NO INJURY.

It has been repeatedly held that this Court will not exert its extraordinary power to control the conduct of one state at the suit of another unless the threatened in-

vasion of rights is of serious magnitude (Washington v. Oregon, 297 U. S. 517, 522, 56 S. Ct. 540, 542). It must appear that substantial interests of Wyoming are being injured before this proceeding may be maintained (Connecticut v. Massachusetts, 282 U. S. 660, 674, 51 S. Ct. 286, 291).

It is apparent that Wyoming has sustained no injury or damage by reason of the acts complained of in her petition. The petition alleges material and substantial injury in general terms only. No loss of, or damage to, crops in 1939 is asserted because of any withholding of water by Colorado. No allegation is made as to the nature or pecuniary amount of any damage. Moreover, a consideration of the allegations of the petition together with the admission of Wyoming fails to disclose that Wyoming was deprived of her equitable share of the stream flow in 1939.

In paragraphs 5 and 7 of her petition, Wyoming sets out the diversions by the Colorado transmountain appropriators as follows:

Skyline Ditch (to June 18)	9,013 acre feet;
Laramie-Poudre Tunnel (to June 18)	7,458 acre feet;
Wilson Supply Ditch (to June 18)	872 acre feet;
Skyline Ditch (June 22 to July 11)	3,644 acre feet;
Laramie-Poudre Tunnel (June 22 to July 11)	2,530 acre feet;
Total	23,517 acre feet.

The difference between this amount and 39,750 acre feet, or 16,233 acre feet, admittedly was available to supply the Colorado meadowland appropriations.

The petition sets out the meadowland diversions as follows:

To June 18, 1939	22,526 acre feet;
June 22 to July 11	6,499 acre feet;
Total	29,025 acre feet.

Colorado has heretofore shown that Wyoming by her pleadings in this litigation, and by the admission of her officials, has conceded that 75% of the meadowland headgate diversions return to the stream and are available for diversion and use in Wyoming. Hence the alleged Colorado meadowland diversions resulted in a withholding from Wyoming of an amount of water equal to 25% of 29,025 acre feet, or 7,256 acre feet. This amount added to the 23,517 acre feet of water taken by the Colorado transmountain appropriators makes a total of 30,773 acre feet of water which was actually withheld by Colorado from Wyoming. This is 8,977 acre feet less than this Court has determined Colorado's equitable share of the stream flow to be.

Moreover, it is easily demonstrable that the administration of Colorado's equitable apportionment of the stream flow in accordance with local Colorado law in future years will substantially benefit Wyoming and will in fact deprive Colorado of a portion of her equitable share of stream flow. The Wyoming petition alleges in Paragraph Fifth that on June 18, 1939, when there had been headgate diversions in Colorado of 39,750 acre feet; 17,343 acre feet had been diverted by the Colorado transmountain appropriators who export the water to another river basin. Deducting this amount from 39,750 we find that 22,417 acre feet was thus available for the meadowland appropriations. Under the admissions of Wyoming heretofore quoted that 75% of the meadowland headgate diversions returned to the stream, only one-fourth of such meadowland diversions or 5,604 acre feet was actually withheld from Wyoming by June 18th. This figure added to the amount taken by the transmountain appropriators makes a total of 22,947 acre feet of water actually withheld from Wyoming or 16,803

acre feet less than the amount which this Court has determined to be Colorado's equitable share of stream flow. The Colorado district court has held that in the administration of the flow of the Laramie river in Colorado the Colorado decrees are to be followed until a total of 39,750 acre feet has been diverted at the headgates and all headgates are then to be closed. As alleged in Paragraph VIIIth of her return Colorado will in the future so administer the stream unless otherwise ordered by this Court. Accordingly, taking the figures set out in Wyoming's petition as being representative, Colorado under such administration of the stream will lose annually 16,803 acre feet of water.

It is thus apparent that instead of suffering injury in 1939, Wyoming, under the allegations of her petition considered together with her admissions, received a benefit which will be even greater in the years to come unless Colorado obtains some relief from this Court.

This Court has well said in Missouri v. Illinois, 200 U. S. 496, 522, 26 S. Ct. 268, 270:

> "Even in cases between individuals some consideration is given to the practical course of events."

VII.

WYOMING HAS MADE NO SHOWING TO JUSTIFY THE EXERCISE OF THE EXTRAORDINARY POWER TO PUNISH FOR CONTEMPT.

The power to punish for contempt is to be used sparingly and with great caution and deliberation even in cases involving individuals. This Court has said that (Gompers v. Bucks Stove & Range Company, 221 U. S. 418, 451, 31 S. Ct. 492, 502): "* * * the very amplitude of the power (to punish for contempt) is a warning to use it with discretion, and a command never to exert it where it is not necessary or proper."

In this proceeding one state of the union seeks to have a sister state adjudged in contempt and punished therefor. A similar situation appears to have never before arisen in the history of our union. There is no precedent for such action. In Louisiana v. Texas, 176 U. S. 1, 18, 20 S. Ct. 251, 257, it was said "public policy forbids the imputation to authorized official action of any other than legitimate motives." In Ex Parte Kentucky v. Dennison, 24 How. 66, 109; 16 L. Ed. 717, 730, this Court in referring to the duty of a governor to honor an interstate rendition request said, "but if the governor of Ohio refuses to discharge this duty there is no power delegated to the general government either through the judicial department or any other department to seek coercive means to compel."

However, Colorado says that this Court may by appropriate action enforce its decrees and accordingly defends upon the ground that Wyoming has failed to make out a case and that the diversions complained of were made with Wyoming's consent.

From the time of the settlement of the Laramie River Valley up through the irrigation season of 1938 Colorado meadowland appropriators irrigated their lands in accordance with their rights under applicable Colorado laws. These rights existed prior to the entry by this Court of its decree of October 9, 1922, and were recognized by that decree in the amount of 4,250 acre feet, an amount far below their rights under their Colorado priorities if such figure be held to refer to headgate diversions rather than consumptive use. The water officials and water users of both Wyoming and Colorado, well knowing that no hay crops could be raised on 4,250 acres of Laramie river hay land by the application thereto of but 4,250 acre feet of water, assumed that the figure mentioned in the decree referred to consumptive use. The irrigation practices continued as before. By its opinion and decree of June 1, 1936, the Court held that this view was erroneous and that the figure there mentioned referred to headgate diversions.

Nevertheless, the long existing irrigation practices continued through 1936, 1937 and 1938.

In the fall of 1938 Colorado meadowland appropriators brought suit in the proper Colorado court against the Colorado transmountain diverters and the Colorado officials for a declaratory judgment and injunction. In that action the meadowland appropriators contended that the decrees of this Court equitably apportioned the flow of the Laramie river between the two states and that upon such equitable apportionment the Colorado laws applied to distribute the water among Colorado water users. The defendants contended that the decrees of this Court modified the Colorado decrees both in amounts and priorities and gave to the Colorado transmountain diverters the right to divert annually specific amounts of water without regard to the meadowland decrees which, under the Colorado law, were senior in point of time. The Colorado district court entered a decree in favor of the plaintiffs and required the Colorado water officials to proceed in conformity with the Colorado laws until 39,750 acre feet of water had been diverted and then to close all headgates. A reading of the decree will convince anyone that the Colorado Court was endeavoring to comply with the decisions and decrees of this Court and was in no way disregarding or questioning the binding force of such decrees.

Prior to the 1939 irrigation season the Colorado meadowland appropriators were required for the first time to install measuring devices. The Colorado state engineer employed additional assistants to administer the stream flow and, when 39,750 acre feet had been diverted, closed all headgates and posted notices thereon. The Colorado transmountain diverters objected to the closing of their headgates, contending that their rights were fixed by this Court. Meadowland appropriators, as we have pointed out with the consent and acquiescence of Wyoming, reopened their headgates. A situation thus developed which had never before occurred. The Colorado state engineer was

in a quandary as to how to proceed. Wyoming at the conference heretofore mentioned made no objection to the reopening of the meadowland headgates but confined her protest to the transmountain diversions. On July 13, the Colorado state engineer again closed all headgates.

These facts establish that Wyoming has failed to prove "by clear and convincing evidence" an injury "of serious magnitude." To the contrary they establish that Colorado has lost, and unless relief can be obtained from this Court, will continue to lose a very substantial portion of her equitable share of the flow of the Laramie river. In spite of this loss Colorado, with full realization of her duties as a member of the union, can and will abide by and uphold the decisions of this Court.

VIII.

CONCLUSION.

Litigation over the Laramie river has been pending between Wyoming and Colorado for twenty-nine years. This Court might well suggest, as it did in New York v. New Jersey, 256 U. S. 296, 313, 41 S. Ct. 492, 498, that the problem be solved "by cooperative study and by conference and mutual concession on the part of representatives of the states so vitally interested."

Colorado asks that the rule to show cause be discharged and that the petition of Wyoming be dismissed.

Respectfully submitted.

RALPH L. CARR,
Governor of the State of Colorado,

CLIFFORD H. STONE,
JEAN S. BREITENSTEIN,
Special Counsel for the State of Colorado.

Denver, Colorado,
March 30, 1940.